

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----:
:
SONY MUSIC ENTERTAINMENT, et al.,:
Plaintiffs, :
:
-vs- : Case No. 1:18-cv-950
:
:
COX COMMUNICATIONS, INC., et al.,:
Defendants. :
:
-----:

HEARING ON MOTIONS

October 24, 2019

Before: Liam O'Grady, USDC Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, Jeffrey M. Gould,
and Andrew Guerra, Counsel for the Plaintiffs

Thomas M. Buchanan, Michael S. Elkin, Jennifer A. Golinveaux,
Thomas Patrick Lane, and Diana Hughes Leiden,
Counsel for the Defendants

1 But it's not -- in a statutory damages case, it is not an
2 affirmative defense, Your Honor.

3 With that, I will leave it to Mr. Zebrak.

4 THE COURT: All right.

5 MR. ZEBRAK: Thank you, Your Honor. Very briefly, I
6 would like to briefly address each of the pair of arguments
7 that Cox raised with respect to statutory damages.

8 THE COURT: Go ahead.

9 MR. ZEBRAK: The first argument is what by shorthand
10 we reference as the album/track argument that they make. Which
11 is that if multiple tracks were ever on the same album and they
12 are in this case, that means there is only one award of
13 statutory damages.

14 Quite frankly, Your Honor, this is not a serious
15 argument. And in a tell of how insubstantial the argument is,
16 Cox in its initial briefing and then again here today didn't
17 brief Your Honor on what the law or the facts are.

18 THE COURT: Well, Mr. Elkin cited the MP3 case and a
19 second case, right?

20 MR. ZEBRAK: Sure. But by that let me explain what I
21 mean. So, first of all, in the BMG case Your Honor recognized
22 correctly that nothing in the Copyright Act bars a plaintiff
23 from recovering a statutory damage award for a sound recording
24 issued as an individual track simply because that plaintiff at
25 some point in time also included that sound recording as part

1 of an album or other compilation.

2 THE COURT: Right. The duplication argument. Go
3 ahead.

4 MR. ZEBRAK: Right. But that was not in Cox's
5 initial papers or its argument today. And I wished to bring it
6 before the Court because Your Honor wasn't the first court to
7 reach that correct result, nor the last court since.

8 The very MP3 Tunes case they rely on from the Second
9 Circuit reaches the same result that Your Honor did, as did the
10 LimeWire case in New York as well. And the reason for that is
11 that what constitutes a work is different than registration.
12 Registration, you know, there are all sorts of different ways
13 that works are protected by registrations. And Cox tries to
14 conflate the two.

15 And Your Honor and other courts, including the Second
16 Circuit, have correctly recognized that where a work is
17 separately distributed as a track, not just as part of an
18 album, separate statutory damage awards are appropriate.

19 Now, rather than address that head on today or in its
20 briefing, Cox ignored it. And instead focuses on what some
21 other courts look to, which is whether a work has independent
22 economic value.

23 Now, we pointed out that these works do have
24 independent economic value, but that's not the sole basis for
25 our argument. It's the fact that these tracks and these

1 compositions -- well, their argument applies with respect to
2 sound recordings. But the point, Your Honor, is that these
3 sound recordings have been commercialized individually. Now,
4 that's the evidence of the case. We put in detailed
5 declarations to that effect.

6 Now, if there wasn't deposition testimony about it,
7 it's because Cox didn't choose to focus on that. Winston &
8 Strawn is well aware that in the digital age these tracks have
9 been commercialized individually. And there is a number of
10 courts that have essentially said that a per-track award is
11 appropriate on this ground.

12 And it's not just our testimonial evidence, which is
13 not -- though they address this just in a footnote in their
14 reply brief, we have multiple paragraphs from our declarants in
15 our opposition to their summary judgment motion explaining that
16 these were commercialized individually.

17 So let me move to the second of the pair of
18 arguments. I know time is tight.

19 Mr. Elkin referred to our arguments as tortured and
20 largely dismissed them, but notably without addressing them,
21 Your Honor. And that I think is reflective of the fact that
22 our argument, we believe, is a plain reading of the statutory
23 text and actually one that, though Cox asks this Court to sort
24 of blindly follow the Second Circuit's non-dispositive
25 decision, the Second Circuit didn't address our argument

1 either. Which is that the plain statutory text indicates in
2 the singular, the copyright owner makes an election.

3 And we think the plain reading of the statute is that
4 the all parts of a derivative work or one work limitation only
5 applies where it's a single owner that owns the derivative work
6 and the underlying work. And I will explain why.

7 First of all, Congress obviously knows how to write
8 in the singular or the plural. And five times in section 504
9 it uses the singular.

10 Now, it's not just that. I noticed this earlier
11 today, but actually in 504(b) it's not just the singular or
12 referring to the infringer, but it refers to him or her. Which
13 is further reenforcing that we're talking about a singular
14 here. It's hard to pluralize him or her with just the addition
15 of an "s."

16 Now, when we made this argument, Cox has never cited
17 a court that rejects our argument. Instead, it cites 1 U.S.C.
18 1, which says, unless the context indicates otherwise, words
19 can be pluralized or from pluralized made to the singular in
20 interpreting a statute.

21 Now, we submit, Your Honor, that the context clearly
22 indicates otherwise. It's not -- you know, the context might
23 not indicate otherwise if there was an interchangeable use of
24 singular or not, but it used it five times. So that's the
25 first thing.

1 The second point, Your Honor, is that to pluralize
2 "copyright owner" here gives it a very different meaning. Now,
3 I understand pluralizing a word, if it just allows for various
4 permutations of the same meaning, but it is a clearly different
5 meaning if in a case like this, when two works are independent
6 -- two works have been infringed, we get one award, that's a
7 very different meaning and not one that we think should just be
8 shooed under the rug based on a statutory provision that says
9 that you have to pay attention to whether the context indicates
10 otherwise.

11 And the third reason why the context indicates
12 otherwise, Your Honor, is something that Judge Rakoff
13 recognized in the TV Tunes decision that we cite in our papers
14 that the MP3 Tunes case disagreed with. Cox refers to our
15 argument in this regard as a policy argument. It's not a
16 policy argument. It's an argument for why the context
17 indicates otherwise.

18 And it's as follows. The statutory damage provision
19 talks about this election being made and all parts of a
20 derivative work being one work for statutory damage purposes.
21 It talks about it in the context of a single action. Cox
22 acknowledges that we could avoid the draconian anti-copyright
23 results that totally stifles the ability of a copyright owner's
24 incentive to create, and all the fundamental logic behind the
25 Copyright Act, that draconian result that they advocate for

1 here, we could avoid that result by bringing separate cases.

2 This is the absurdity that Judge Rakoff pointed out.

3 Now, if Congress intended for something like -- well,
4 first of all, Congress wouldn't -- why would Congress intend
5 for a result that you could separately obtain awards that you
6 couldn't obtain in a single case? It's anti-judicial
7 efficiency. It stifles peoples' ability to protect their
8 works. There is a million reasons why.

9 So for those reasons, we argue that our plain text
10 reading is -- ought not to be dismissed as a tortured reading.
11 It is a correct one, notwithstanding that the Second Circuit
12 didn't address this issue.

13 And, quite frankly, the Second Circuit, what it did,
14 it laid out the statutory provisions. Then what it did, it
15 proceeded to cite a treatise, Patry, which simply cited the
16 derivative work provision. And then it cites legislative
17 history.

18 And Your Honor is well aware about the utility of
19 legislative history in a matter like this. And the legislative
20 history is sparse, there is not much there. And to the extent,
21 you know, one looks at the legislative history -- and we don't
22 think you need to because the plain text, as the rules of
23 construction command, we think is in our favor. Especially in
24 our favor when you recognize that it is an obligation of
25 construction to give meaning to each of the disparate language,

1 and ours is the only one that does that.

2 But if you look at the legislative history, what we
3 think is much more likely is that what Congress had in mind was
4 some scenario where -- and I'm speculating, obviously -- is a
5 scenario where you have, you know, a software company that
6 maybe has three versions of a piece of software, and they own
7 the work and the various components in it.

8 There is no indication that Congress had in mind
9 owners of different types of works, let alone sound recordings
10 and musical works. And we think, again, you don't even need to
11 look at that because the statute is clear.

12 Thank you.

13 THE COURT: Thank you.

14 MR. ELKIN: Your Honor, may I have 60 seconds?

15 THE COURT: You may have three minutes.

16 MR. ELKIN: All right, thank you. I'll try to make
17 good use of it.

18 First of all, shockingly, I actually did read the
19 Branch case.

20 THE COURT: Yeah, I --

21 MR. ELKIN: And I can tell you that the Branch case
22 confirms that even if spreadsheets qualify as business records,
23 such business records are inadmissible if they are summaries
24 under FRE 1006 and the underlying data is not made available.

25 And the Sprint Nextel case also confirms, as it